

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JULIE LOPEZ,

Plaintiff,

v.

MARTIN O'MALLEY,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

Case No. 1:23-cv-01644-HBK

ORDER AFFIRMING THE DECISION OF  
THE COMMISSIONER OF SOCIAL  
SECURITY<sup>2</sup>

(Doc. Nos. 15, 19)

Julie Lopez ("Plaintiff"), seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner" or "Defendant") denying her application for disability insurance benefits under the Social Security Act. (Doc. No. 1). The matter is currently before the Court on the parties' briefs, which were submitted without oral argument. (Doc. Nos. 15, 19). For the reasons set forth more fully below, the Court denies Plaintiff's motion for summary judgment, grants Defendant's motion for summary judgment, and affirms the Commissioner's decision.

<sup>1</sup> The Court has substituted Martin O'Malley, who has been appointed the Acting Commissioner of Social Security, as the defendant in this suit. *See* Fed. R. Civ. P. 25(d).

<sup>2</sup> Both parties have consented to the jurisdiction of a magistrate judge, in accordance with 28 U.S.C. §636(c)(1). (Doc. No. 7).

## I. JURISDICTION

Plaintiff protectively filed for disability insurance benefits on September 19, 2022, alleging an onset date of October 1, 2019. (AR 201-02). Benefits were denied initially (AR 48-55, 74-78), and upon reconsideration (AR 56-66, 80-85). Plaintiff appeared at a telephonic hearing before an Administrative Law Judge (“ALJ”) on June 22, 2023. (AR 25-47). Plaintiff was represented by counsel and testified at the hearing. (*Id.*). On August 1, 2023, the ALJ issued an unfavorable decision (AR 12-24), and on September 22, 2023 the Appeals Council denied review (AR 1-6). The matter is now before this Court pursuant to 42 U.S.C. § 1383(c)(3).

## II. BACKGROUND

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ’s decision, and the briefs of Plaintiff and Commissioner. Only the most pertinent facts are summarized here.

Plaintiff was 56 years old at the time of the hearing. (*See* AR 227). Her highest level of education reported was ninth grade. (AR 35). Plaintiff has work history as a day worker. (AR 34-35, 43). Plaintiff testified that she uses an inhaler every day due to breathing issues, and she has left knee pain that hurts “all the time.” (AR 37). She reported that during the relevant period she could stand and walk for 30 to 45 minutes before she needed to rest for 20 to 25 minutes; she could sit for an hour or two; and she could lift and carry 10 pounds. (AR 37-38). Plaintiff testified that she elevated her knee for 45 minutes at a time. (AR 39). She reported lower back pain during the relevant period that caused her to have “bad days” about 8 or 9 “times” in a month. (AR 40-42).

## III. STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence

1 equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and  
2 citation omitted). In determining whether the standard has been satisfied, a reviewing court must  
3 consider the entire record as a whole rather than searching for supporting evidence in isolation.  
4 *Id.*

5 In reviewing a denial of benefits, a district court may not substitute its judgment for that of  
6 the Commissioner. “The court will uphold the ALJ’s conclusion when the evidence is susceptible  
7 to more than one rational interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.  
8 2008). Further, a district court will not reverse an ALJ’s decision on account of an error that is  
9 harmless. *Id.* An error is harmless where it is “inconsequential to the [ALJ’s] ultimate  
10 nondisability determination.” *Id.* (quotation and citation omitted). The party appealing the ALJ’s  
11 decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556  
12 U.S. 396, 409-10 (2009).

#### 13 IV. SEQUENTIAL EVALUATION PROCESS

14 A claimant must satisfy two conditions to be considered “disabled” within the meaning of  
15 the Social Security Act. First, the claimant must be “unable to engage in any substantial gainful  
16 activity by reason of any medically determinable physical or mental impairment which can be  
17 expected to result in death or which has lasted or can be expected to last for a continuous period  
18 of not less than twelve months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment  
19 must be “of such severity that he is not only unable to do his previous work[,] but cannot,  
20 considering his age, education, and work experience, engage in any other kind of substantial  
21 gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A).

22 The Commissioner has established a five-step sequential analysis to determine whether a  
23 claimant satisfies the above criteria. See 20 C.F.R. § 404.1520(a)(4)(i)-(v). At step one, the  
24 Commissioner considers the claimant’s work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the  
25 claimant is engaged in “substantial gainful activity,” the Commissioner must find that the  
26 claimant is not disabled. 20 C.F.R. § 404.1520(b).

27 If the claimant is not engaged in substantial gainful activity, the analysis proceeds to step  
28 two. At this step, the Commissioner considers the severity of the claimant’s impairment. 20

1 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers from “any impairment or combination of  
2 impairments which significantly limits [his or her] physical or mental ability to do basic work  
3 activities,” the analysis proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s  
4 impairment does not satisfy this severity threshold, however, the Commissioner must find that the  
5 claimant is not disabled. 20 C.F.R. § 404.1520(c).

6 At step three, the Commissioner compares the claimant’s impairment to severe  
7 impairments recognized by the Commissioner to be so severe as to preclude a person from  
8 engaging in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(iii). If the impairment is as  
9 severe or more severe than one of the enumerated impairments, the Commissioner must find the  
10 claimant disabled and award benefits. 20 C.F.R. § 404.1520(d).

11 If the severity of the claimant’s impairment does not meet or exceed the severity of the  
12 enumerated impairments, the Commissioner must pause to assess the claimant’s “residual  
13 functional capacity.” Residual functional capacity (RFC), defined generally as the claimant’s  
14 ability to perform physical and mental work activities on a sustained basis despite his or her  
15 limitations, 20 C.F.R. § 404.1545(a)(1), is relevant to both the fourth and fifth steps of the  
16 analysis.

17 At step four, the Commissioner considers whether, in view of the claimant’s RFC, the  
18 claimant is capable of performing work that he or she has performed in the past (past relevant  
19 work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable of performing past relevant  
20 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 404.1520(f). If  
21 the claimant is incapable of performing such work, the analysis proceeds to step five.

22 At step five, the Commissioner considers whether, in view of the claimant’s RFC, the  
23 claimant is capable of performing other work in the national economy. 20 C.F.R. §  
24 404.1520(a)(4)(v). In making this determination, the Commissioner must also consider  
25 vocational factors such as the claimant’s age, education, and past work experience. 20 C.F.R. §  
26 404.1520(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must  
27 find that the claimant is not disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable  
28 of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is

1 therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

2 The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*,  
 3 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the  
 4 Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such  
 5 work “exists in significant numbers in the national economy.” 20 C.F.R. § 404.1560(c)(2);  
 6 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

## 7 **V. ALJ’S FINDINGS**

8 At step one, the ALJ found that Plaintiff did not engage in substantial gainful activity  
 9 during the period from her alleged onset date of October 1, 2019 through her date last insured of  
 10 December 31, 2019. (AR 18). At step two, the ALJ found that through the date last insured,  
 11 there were no medical signs or laboratory findings to substantiate the existence of a medically  
 12 determinable impairment. (AR 18). The ALJ also noted that objective evidence in the record  
 13 supports that Plaintiff was not suffering from any severe conditions prior to her date last insured  
 14 of December 31, 2019. (AR 19-20). On this basis, the ALJ concluded that Plaintiff has not been  
 15 under a disability, as defined in the Social Security Act, at any time from October 1, 2019, the  
 16 alleged onset date, through December 31, 2019, the date last insured. (AR 20).

## 17 **VI. ISSUES**

18 Plaintiff seeks judicial review of the Commissioner’s final decision denying her disability  
 19 insurance benefits under Title II of the Social Security Act. (Doc. No. 1). Plaintiff raises the  
 20 following issue for this Court’s review: whether the ALJ erred at step two. (Doc. No. 15 at 8-12).

## 21 **VII. DISCUSSION**

22 At step two of the sequential process, the ALJ must determine whether the claimant  
 23 suffers from a “severe” impairment. 20 C.F.R. § 404.1520(a)(4)(ii). This a two-step inquiry.  
 24 First, the ALJ must determine if a claimant has a medically determinable impairment, meaning it  
 25 “must result from anatomical, physiological, or psychological abnormalities that can be shown by  
 26 medically acceptable clinical or laboratory diagnostic techniques.” 20 C.F.R. § 404.1521. More  
 27 specifically, it “must be established by objective medical evidence from an acceptable medical  
 28 source,” and a claimant’s “statement of symptoms, a diagnosis, or a medical opinion” is not

1 enough to establish a medically determinable impairment. *Id.* Second, the ALJ must determine  
2 whether the medically determinable impairment is “severe,” meaning it significantly limits a  
3 claimant’s physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c).

4 Plaintiff bears the burden to establish the existence of a severe impairment or combination  
5 of impairments, which prevent her from performing substantial gainful activity, and that the  
6 impairment or combination of impairments lasted for at least twelve continuous months. 20  
7 C.F.R. § 404.1505, 404.1512(a); *Edlund v. Massanari*, 253 F.3d 1152, 1159, 60 (9th Cir. 2011).  
8 However, step two is “a de minimus screening device [used] to dispose of groundless claims.”  
9 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying our normal standard of  
10 review to the requirements of step two, [the Court] must determine whether the ALJ had  
11 substantial evidence to find that the medical evidence clearly established that [Plaintiff] did not  
12 have a medically severe impairment or combination of impairments.” *Webb v. Barnhart*, 433  
13 F.3d 683, 687 (9th Cir. 2005).

14 Here, Plaintiff alleged disability due to COPD (chronic obstructive pulmonary disease),  
15 diabetes mellitus type II, and hypertension. (AR 18, 230). The ALJ found “there were no medical  
16 signs or laboratory findings to substantiate the existence of a medically determinable impairment  
17 through the date last insured.” (AR 18-20). Plaintiff argues there was “sufficient evidence of  
18 record to establish severe medically determinable impairments supported with objective  
19 evidence” and contends the ALJ failed to provide a requisite explanation of the step two findings.  
20 (Doc. No. 15 at 10). Defendant “acknowledges that the ALJ erred in finding that Plaintiff did not  
21 have a [medically determinable impairment]” but argues any error is harmless because  
22 “substantial evidence supports the ALJ’s alternative finding that Plaintiff’s impairments were  
23 nonsevere.” (Doc. No. 19 at 5 n.3). The Court declines to make a ruling on whether the  
24 impairments were medically determinable considering Defendant’s concession; however, the  
25 Court agrees that substantial evidence supports the ALJ’s finding that the “objective evidence of  
26 record supports that the claimant was not suffering from any severe conditions prior to her date  
27 last insured of December 31, 2019.” (AR 19).

28 First, as to Plaintiff’s newly alleged impairments of lower back and left knee pain, the

1 ALJ recognized all of the objective evidence cited by Plaintiff in support of this argument,  
2 including a single x-ray of her left knee that revealed degenerative disease, a joint effusion, and  
3 no evidence of fracture or dislocation; and an “incidental finding” of degenerative change at the  
4 L5-S1 disc space during a CT of the abdomen and pelvis in 2019. (AR 19 (citing AR 479, 731  
5 (noting “mild degenerative changes,”) 840-41). However, while not acknowledged by Plaintiff,  
6 the ALJ also cited evidence that Plaintiff had taken a fall on her knee several weeks prior to the  
7 knee x-ray, examination at the time revealed some swelling but normal range of motion, and  
8 examination findings during the relevant adjudicatory period subsequently found no difficulty  
9 ambulating, a good steady gait, normal gait and reflexes, no sensory deficits, normal motor  
10 strength 5/5 throughout, normal range of motion, and normal coordination. (AR 19 (citing AR  
11 431, 442 (normal strength, range of motion, gait and station), 448, 451-52, 477 (ambulating  
12 without difficulty), 478 (reporting left knee is “not very painful”), 479 (some swelling, normal  
13 range of motion of knee, and no erythema), 686 (noting degenerative change in L5-S1 disc space  
14 but no suspicious lesion or acute injury), 805, 861). The ALJ also noted that Plaintiff “denied  
15 back pain, joint pain, and stiffness on multiple occasions even after her date last insured.” (AR  
16 19, 358-59 (reporting no restriction of movements), 417, 424-26, 457, 911, 913). Finally, the  
17 ALJ noted that there are “no limitations described to such a condition.” (AR 19). Plaintiff does  
18 not offer, nor does the Court discern, any evidence of specific functional limitations due to knee  
19 or back pain such that it would significantly limit Plaintiff’s ability to do basic work activities.  
20 *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).

21 Second, as to her “complaints of disabling pneumonia and COPD,” the ALJ found there  
22 was no objective evidence “of such severity to consider it a severe impairment.” (AR 19).  
23 Plaintiff argues there was sufficient evidence in the medical record to establish a severe medically  
24 determinable impairment. (Doc. No. 15 at 10). However, the ALJ’s decision again  
25 acknowledged the medical evidence cited by Plaintiff in support of her argument, including a  
26 prescription for an inhaler and prednisone burst, notation of COPD diagnosis, notation of history  
27 of respiratory dysfunction, in-patient treatment for pneumonia noted as “atypical chest pain  
28 resolved” on May 1, 2019, one examination noting “slightly diminished lung sounds with some



1 scattered wheezing,” and Plaintiffs reported of shortness of breath. (AR 19, 434-36, 450 (noting  
2 negative chest x-ray), 455 (noting no ischemic changes on EKG)). The ALJ also cited normal  
3 objective findings including clear lungs with no evidence of pneumonia by chest x-ray, and SpO2  
4 of 97%. (AR 19, 435, 450, 455, 830). “[W]here evidence is susceptible to more than one rational  
5 interpretation, it is the [Commissioner’s] conclusion that must be upheld.” *Burch v. Barnhart*,  
6 400 F.3d 676, 679 (9th Cir. 2005); *see also Saballos v. Colvin*, 2015 WL 1481563, at \*7 (N.D.  
7 Cal. Mar. 31, 2015) (“Having a diagnosis and taking medication for over one year does not  
8 automatically render an impairment severe for the purposes of step two.”).

9       Moreover, even assuming, *arguendo*, that the ALJ erred in finding a lack of objective  
10 evidence to support a finding that COPD is a severe impairment at step two, the ALJ additionally  
11 found Plaintiff’s “COPD with continued nicotine abuse has not met the durational requirement.”  
12 (AR 19). Plaintiff failed to identify or challenge this finding in her opening brief; thus, she has  
13 waived her opportunity to raise this issue. *Carmickle*, 533 F.3d at 1161 n.2 (court may decline to  
14 consider issues not raised with specificity in plaintiff’s opening brief); *see also Kim v. Kang*, 154  
15 F.3d 996, 1000 (9th Cir. 1998) (the Court may not consider on appeal issues not “specifically and  
16 distinctly argued” in the party’s opening brief). Regardless, in order to be severe at step two, an  
17 impairment must satisfy the “duration requirement,” that is, it “must have lasted or must be  
18 expected to last for a continuous period of at least 12 months.” *See* 20 C.F.R. § 404.1509,  
19 404.1520(a)(4)(ii); *see also Christin D. v. Kijakazi*, 2024 WL 4132436, at \*4 (D. Nev. Sept. 10,  
20 2024) (“An ALJ may discount impairments at step two of the sequential analysis by finding that  
21 an impairment is non-severe because it has not met the 12-month durational requirement.”);  
22 *Dennis G. v. Comm’r of Soc. Sec.*, 2020 WL 3620100, at \*5 (E.D. Wash. Mar. 30, 2020)  
23 (concluding it was reasonable for the ALJ to find impairment was not severe because “there is no  
24 12-month period during which [plaintiff] has had continuous swelling,” the claimed impairments  
25 of edema, lymphadenopathy, and cellulitis do not meet the durational requirement). It was  
26 reasonable for the ALJ to find that the sporadic treatment for respiratory issues in the treatment  
27 record, noted by the Court to be comprised entirely of records before the alleged onset date of  
28 October 1, 2019, do not meet the durational requirement, particularly in light of Plaintiff’s date



1 last insured of December 31, 2019. (*See* AR 19).

2 Finally, as noted by Defendant, the ALJ cited the state agency medical consultants’  
 3 opinions that Plaintiff did not have a severe impairment prior to her date last insured in support of  
 4 the ultimate step two finding. (AR 20 53 (opining Plaintiff did not have one or more medically  
 5 determinable impairments), 62 (opining Plaintiff did have medically determinable impairments  
 6 but they were not severe either)). The ALJ found the opinions “very persuasive as there is  
 7 nothing in the objective evidence of record to support the claimant had a severe impairment that  
 8 met the durational requirement of 12 months prior to her date last insured of December 31, 2019.”  
 9 (AR 20). Plaintiff does not challenge the ALJ’s evaluation of, or reliance on, these opinions.  
 10 *Carmickle*, 533 F.3d at 1161 n.2 (court may decline to consider issues not raised with specificity  
 11 in plaintiff’s opening brief). Regardless, it was reasonable for the ALJ to rely on these opinions  
 12 to support the ALJ’s finding that Plaintiff had no severe impairments at step two. *See Garcia v.*  
 13 *O’Malley*, 2024 WL 3968100, at \*6 (E.D. Cal. Aug. 28, 2024) (finding prior administrative  
 14 medical findings supported the ALJ’s findings that Plaintiff’s mental impairments were  
 15 nonsevere); *Correia v. Comm’r of Soc. Sec.*, 2023 WL 2058894, at \*4 (E.D. Cal. Feb. 16, 2023)  
 16 (finding the ALJ supported finding that impairments were not severe at step two with substantial  
 17 evidence from the record including medical opinions of two state agency consultants).

18 Based on the foregoing, and considering the record as a whole, substantial evidence  
 19 supports the ALJ’s conclusion that Plaintiff’s alleged impairments were not severe. *Webb*, 433  
 20 F.3d at 687. The ALJ did not err in finding Plaintiff did not establish a severe impairment at step  
 21 two of the sequential analysis.<sup>3</sup>

## 22 VIII. CONCLUSION

23 A reviewing court should not substitute its assessment of the evidence for the ALJ’s.  
 24 *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must defer to an ALJ’s assessment  
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26 <sup>3</sup> Plaintiff argues “the ALJ erred in failing to properly consider Plaintiff’s limited treatment in light of her  
 27 indigence.” (Doc. No. 15 at 12 (citing *Dschaak v. Astrue*, 2011 WL 4498835, at \*1 (D. Or. Sept. 27,  
 28 2011)). However, as argued by Defendant, the ALJ did not err by failing to consider possible reasons for  
 Plaintiff’s lack of treatment because lack of treatment was not offered as a reason to find Plaintiff’s  
 impairments not severe at step two. (*See* Doc. No. 19 at 9).

as long as it is supported by substantial evidence. 42 U.S.C. § 405(g). As discussed in detail above, the ALJ did not err at step two. After review, the Court finds the ALJ's decision is supported by substantial evidence and free of harmful legal error.

Accordingly, it is **ORDERED**:

1. Plaintiff's Motion for Summary Judgment (Doc. No. 15) is DENIED.
2. Defendant's Cross Motion for Summary Judgment (Doc. No. 19) is GRANTED and the decision of the Commissioner of Social Security for the reasons set forth above.
3. The district court direct the Clerk to enter judgment in favor of the Commissioner of Social Security, terminate any pending motions/deadlines, and close this case.

Dated: November 27, 2024

  
HELENA M. BARCH-KUCHTA  
UNITED STATES MAGISTRATE JUDGE